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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA — WESTERN DIVISION
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11 JOHN G. WESTINE,) Case No. CV 08-4766-R (JWJ)
12 Petitioner,)
13 v.) MEMORANDUM AND ORDER
14 JOSEPH NORWOOD, Warden,) DISMISSING ACTION WITHOUT
15 Respondent.) PREJUDICE
16 _____

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18 I. BACKGROUND

19 On July 21, 2008, Petitioner John G. Westine, proceeding pro se, filed a
20 “Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241 (c) (3) by a
21 Person in Federal Custody Under [5] Section § 2255 Known as the “Escape
22 Hatch” (hereinafter “Petition”).¹ The Court has screened the Petition pursuant
23 to 28 U.S.C. § 2243, the Federal Rules of Civil Procedure and the Local Rules
24 of the Central District of California.

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26 ¹ Petitioner attached an unnumbered series of pages labeled “Emergency Motion”
27 (hereinafter “Attachment”). For clarity, this Court has numbered the Attachment pages
28 as “1” through “4.” On August 4, 2008, petitioner filed a document titled “Request for
a Court Order Immediate Release Of Prisoner 28 USC § 2243.” On September 4, 2008,
petitioner made an additional filing labeled “Issue Never Denied On Merits ‘Immediate
Release Prisoner.’” These documents purport to set forth his arguments in more detail.

1 manner, location or conditions of a sentence's execution must be brought
2 pursuant to § 2241 in the custodial court. See Doganieri v. United States, 914
3 F.2d 165, 169-70 (9th Cir. 1990); Brown v. United States, 610 F.2d 672, 677
4 (9th Cir. 1990). However, under the savings clause of § 2255, a federal prisoner
5 may file a habeas corpus petition pursuant to § 2241 to contest the legality of a
6 sentence where his remedy under § 2255 is "inadequate or ineffective to test
7 the legality of his detention." 28 U.S.C. § 2255; see Moore v. Reno, 185 F.3d
8 1054, 1055 (9th Cir. 1999). An inquiry into whether a § 2241 petition is
9 proper under these circumstances is critical to the determination of district
10 court jurisdiction because the proper district for filing a habeas petition
11 depends upon whether the petition is filed pursuant to § 2241 or § 2255.
12 Hernandez, 204 F.3d at 865. Where a petitioner claims that § 2255 provides
13 an ineffective remedy, the district court in which the petition is brought is
14 required initially to rule whether a § 2241 remedy is available under the savings
15 clause. Id. at 866.

16 Here, petitioner is clearly challenging the validity of his sentence, since
17 he claims that: 1) his indictment fails to state a federal offense; and 2) he is
18 actually and factually innocent of money laundering under 18 U.S.C. § 1956.
19 (Petition, p. 3.) Thus, petitioner's claims must be addressed in a motion under
20 § 2255 unless he can show that the remedy under § 2255 is "inadequate or
21 ineffective" and therefore, the saving clause would apply in his case. Although
22 the Ninth Circuit has not fully defined when the remedy under § 2255 is
23 "inadequate or ineffective," the exception is very narrow. See Ivy v. Pontesso,
24 328 F.3d 1057, 1059 (9th Cir. 2003).

25 Petitioner argues that the Sixth Circuit of the United States Court of
26 Appeals has barred petitioner from any judicial remedy, and thus his only
27 remedy is under the savings clause of § 2255. (Attachment, p. 3.) However,
28 this argument is insufficient to meet the narrow savings clause exception. The

1 savings clause is not invoked merely because petitioner has previously filed a
2 § 2255 motion: AEDPA's filing limitations on successive § 2255 motions do
3 not render § 2255 inadequate or ineffective. See Moore, 185 F.3d at 1055;
4 Loretsen v. Hood, 223 F.3d 950, 953 (9th Cir. 2000). It follows that because
5 courts of the Sixth Circuit have determined to limit petitioner's vexatious
6 filings in those courts, such limitation does not render a § 2255 motion
7 ineffective or inadequate.

8 Section 2255 provides an "inadequate or ineffective" remedy when the
9 petitioner claims to be factually innocent of the crime for which he has been
10 convicted and has never had an unobstructed procedural shot at presenting this
11 claim. See Ivy v. Pontesso, 328 F.3d at 1060 ("[I]t is not enough that the
12 petitioner is presently barred from raising his claim of innocence by motion
13 under § 2255. He must never have had the opportunity to raise it by motion."
14 (emphasis added)).

15 Petitioner alleges that his indictment fails to state a federal offense.
16 (Petition, p. 3.) Petitioner does not indicate whether he raised this claim in his
17 sentencing court, and if not, why he never had an "unobstructed procedural
18 shot at presenting" it. See Ivy, 328 F.3d at 1060. Thus, petitioner has failed
19 to meet the requisite standards for proceeding under the savings clause of
20 § 2255 on his § 2241 Petition with respect to this claim.

21 Petitioner also asserts that the Supreme Court's decision in United States
22 v. Santos makes him factually innocent of money laundering. (Petition, p. 3.)
23 The Santos court clarified the meaning of the term "proceeds" in the federal
24 money laundering statute, 18 U.S.C. § 1956. United States v. Santos, 128 S.
25 Ct. at 2025. The Supreme Court held that criminal "proceeds" refer only to
26 criminal profits, not criminal receipts. Id. This Court has carefully reviewed
27 petitioner's filings and cannot discern a factual basis for his alleged innocence.
28 Though Santos makes a distinction between criminal profits and criminal

1 receipts, petitioner's filings do not explain with any clarity how this distinction
2 makes him factually innocent of the money laundering crime. The relevant
3 evidence which could shed more light on the factual basis for petitioner's
4 conviction was adduced in the Southern District of Ohio, where his trial took
5 place. Furthermore, this Court is in a substantially inferior position to the
6 Southern District of Ohio to evaluate testimony evidence underlying
7 petitioner's conviction as it is impacted by the Santos opinion.

8 The instant petition is devoid of any indication whether petitioner raised
9 an objection at trial based on the Santos distinction between criminal profits
10 and criminal receipts during his direct appeal of the case, and why he might
11 have been foreclosed from doing so. Petitioner thus has not alleged why he did
12 not have an "unobstructed procedural shot" at raising this claim. See Ivy, 328
13 F.3d at 1060. For the foregoing reasons, petitioner has failed to meet the
14 requisite standards for bringing this claim, pursuant the savings clause of
15 § 2255, under § 2241.

16 Accordingly, this Court construes petitioner's habeas corpus petition,
17 brought pursuant to 28 U.S.C. § 2241, as a motion to vacate, set aside or
18 correct his sentence pursuant to 28 U.S.C. § 2255.² This Court lacks
19 jurisdiction in this matter because a § 2255 petition must be filed in the
20 sentencing court. See Hernandez, 204 F.3d at 864. It is further noted that
21 because petitioner has filed multiple § 2255 motions, the Court is not required
22 to provide petitioner with notice and an opportunity to respond prior to
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24 ² It is further noted that petitioner has filed over 100 petitions, motions, or
25 appeals contesting his confinement on similar grounds, none of which have been
26 meritorious. It is clear that petitioner is placing an undue burden on the court. In
27 August 13, 2008, this Court filed a Report and Recommendation that petitioner is a
28 vexatious litigant and has abused the Court's process pursuant to Local Rules 83-8.3 and
applicable federal law. (Case No. CV 08-3254-R (JWJ).) Petitioner filed Objections to
the Report and Recommendation on August 27, 2008. (Id.)

1 recharacterizing his pro se petition as a § 2255 motion. See *Castro v. United*
2 *States*, 540 U.S. 375, 377, 124 S.Ct. 786, 157 L.Ed.2d 778 (2003) (holding
3 that “the court cannot so recharacterize a pro se litigant’s motion as the
4 litigant’s first §2255 motion unless the court informs the litigant of its intent
5 to recharacterize, warns the litigant that the recharacterization will subject
6 subsequent § 2255 motions to the law’s ‘second or successive’ restrictions, and
7 provides the litigant with an opportunity to withdraw, or to amend, the filing”)
8 (emphasis added).

9 Therefore, the Petition is dismissed without prejudice.

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11 **ORDER**

12 For all the foregoing reasons,

13 **IT IS HEREBY ORDERED AS FOLLOWS:**

- 14 1. The Court finds that this claim is not properly presented as a 28
15 U.S.C. § 2241 petition pursuant to the savings clause of 28 U.S.C.
16 § 2255;

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1 2. The Petition for Writ of Habeas Corpus by a Person in Federal
2 Custody (28 U.S.C. § 2241) shall be construed as a motion
3 pursuant to 28 U.S.C. § 2255 and;

4 3. This action is hereby dismissed without prejudice.

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6 DATED: October 7, 2008_____



MANUEL L. REAL
United States District Judge

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11 Presented by:

12 DATED: October 2, 2008

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14 _____/s/_____
15 JEFFREY W. JOHNSON
16 United States Magistrate Judge